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No. 88-496

In The

Supreme Court of the United States

October Term, 1988

PHILIP A. YOUNG, MAX GOSSARD, ROBERT L. BROEKER, MARK BOKELMAN, JAMES ROHLF, OLIVER E. MOLDESTAD, LARRY GODEJAHN, EMERY PISTULKA and ARTHUR REINSMA,

Petitioners,

v.

STANDARD OIL (INDIANA) and AMOCO OIL COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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39 pp

QUESTIONS PRESENTED

1. Whether there is no sound reason to hold this case for *Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, *cert. granted,* 56 U.S.L.W. 3682 (U.S. 1988) because:

   (a) the issue in *Firestone* is the proper standard for judicial review under the Employee Retirement Income Security Act of 1974 ("ERISA") of the plan fiduciary's interpretation of ambiguous or uncertain plan provisions;

   (b) this case does not present such an issue but rather involves plan provisions which explicitly disallow plan benefits on the undisputed facts presented; and

   (c) in contrast to *Firestone,* petitioners in this case must invalidate or avoid the applicable plan provisions in order to recover benefits.

2. Whether, in circumstances where the petitioner plan participants had no accrued or vested rights to future benefits under the terms of the existing benefit plan, the respondent employer was prevented by ERISA or a "federal common law of contracts" from establishing a new benefit plan prescribing a different eligibility condition for any future benefits.

3. Whether, in circumstances where the terms of a benefit plan do not contravene any statutory or regulatory requirement, ERISA permits judicial review of the plan terms for substantive reasonableness.

4. Whether, under ERISA, plan participants may recover benefits contrary to explicit plan provisions on the basis of "procedural" statutory violations that caused no prejudice to any benefit right or other substantive harm.

RULE 28.1 LISTING

At the time this action was commenced, respondent Amoco Oil Company was a wholly owned subsidiary of respondent Standard Oil (Indiana). In 1985, Standard Oil (Indiana)'s name was changed to Amoco Corporation and Amoco Oil Company became a wholly owned subsidiary of Amoco Company, which is, in turn, a wholly owned subsidiary of Amoco Corporation. Amoco Corporation has no parent corporation. Non-wholly owned subsidiaries or affiliates of Amoco Corporation, including subsidiaries and affiliates of wholly owned subsidiaries, include the following:

Southridge Park Associates
OK Tedi Mining Limited
Bennett/South Shore Association
Chicago Equity Fund 1985 Partnership
5836 W. Washington LTD. Partnership
33 North Lorel Limited Partnership
Midwest Club
Panorama Office Park II
Tangley Oaks
Gene-Trak Systems, Inc.
Intelligenetics, Incorporated
Solare S.P.A.
Trout Lake Golf and Country Club
Detour Lake Mining Project
Rhodiaco Industries Quimicas Ltda
Amoco Fina N.V.
A. G. Intl. Chemical Company, Inc.
Singapore Petroleum Company, PTE., LTD.
Singapore Refining Company PTE., LTD.

Cliffe Storage Limited
Kharg Chemical Company Limited
Petroleum Storage Limited
China American Petrochemical Company, LTD.
Samsung Petrochemical Company, LTD.
ACM Services, Inc.
Atlas Supply Company
Fertilizers of Trinidad & Tobago LTD.
Frontier Pipeline Company
Raven Ridge Pipeline Company
Chicap Pipe Line Company
Wyco Pipe Line Company
Ekma Oil Company
Gulf of Suez Petroleum Company
Rodeis Oil Company
Torsina Oil Company
Iran Pan American Oil Company
Sharjam LPG Company, Limited
Aimsa S.A. DE C.V.
Amoco Exploration Zaire S.P.R.L.
H&R Industries
S.I. Tech. Inc.

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JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") was entered on June 23, 1988. The Petition seeks to invoke the jurisdiction of this Court to review the judgment under 28 U.S.C. § 1254(1). It is unclear whether the Petition meets the 90-day jurisdictional limitation provided by 28 U.S.C. § 2101(c). The only affidavit of mailing served by counsel for petitioners on the respondents was prepared and served in advance of the mailing of the petition and does not comply with the requirements of Supreme Court Rule 28.2. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* at pp. 305-06 (6th ed. 1986).

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STATEMENT OF THE CASE

A. Proceedings Below.

This action was commenced on October 11, 1983 by four of the petitioners in the Circuit Court for Madison County, Indiana, alleging a wrongful denial of severance benefits under a benefit plan maintained by respondents Amoco Oil Company ("Amoco") and Standard Oil (Indiana) ("Standard"). Amoco and Standard removed the action to the United States District Court for the Southern District of Indiana on the ground that the severance plan was a welfare benefit plan within the coverage of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and, therefore, the claims alleged necessarily arose under that federal statute.[1] Petitioners thereafter filed a second amended complaint which alleged claims under ERISA and added the other petitioners as plaintiffs.

On February 28, 1986, after extensive discovery by the parties, Amoco and Standard moved for summary

[1] *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

judgment on all claims alleged by the second amended complaint. After five extensions of time granted by the District Court, petitioners filed their response in opposition to the motion on October 14, 1986. The District Court had an extensive evidentiary record before it on the motion, consisting primarily of affidavits, excerpts from discovery depositions and deposition exhibits filed by the parties pursuant to S.D. IND. R. 15(e). After a hearing on the motion on April 16, 1987, the District Court entered an order setting forth extensive determinations of uncontested facts and conclusions of law, and granted summary judgment in favor of Amoco and Standard. (Pet. App. at A1 *et seq.*) On appeal, the Seventh Circuit affirmed the District Court's judgment in all respects. (Pet. App. at A25 *et seq.*)

B. Statement Of Facts

For a number of years prior to 1983, Amoco owned and operated a Fertilizer & Pesticides Division (the "F & P Division"). The F & P Division had over 800 employees and facilities in 14 States, including several fertilizer processing plants, ammonia terminals and soil laboratories, Torch Chemical (which operated agricultural chemical distributorships), Trekker Chemical (which formulated and manufactured specialty products) and more than 350 retail fertilizer outlets.

Each of the retail outlets in the F & P Division was managed by an employee called a "crop guide manager." Some of the retail outlets also had a second full-time employee called a "helper" or "secondman." Petitioners were each employed in a retail outlet, either as a crop guide manager or helper, in various locations in Indiana, Minnesota and Ohio.

Because of an unsatisfactory return on investment, due principally to changing supply and market conditions, Amoco decided in 1982 to try to divest the F & P Division. An initial effort to sell the Division as a going concern through an investment banking firm was unsuccessful. Thereafter, in July, 1982, Amoco's management considered and approved a proposal for Amoco to divest the F & P Division and withdraw from the business. The proposal in order of priority was (1) to try to sell the business as an entity; (2) to try to sell the business in segments; and (3) if and to the extent that sales were not possible, to shut down the operations. Standard (Amoco's corporate parent) approved the divestiture proposal on July 20, 1982.

Over a period of several years prior to 1981, Standard and Amoco had implemented a number of different severance policies. Effective April 1, 1981, Standard adopted for itself and its subsidiaries the Severance Allowance Policy of Standard Oil Company and Participating Companies (the "1981 Severance Policy"). The 1981 Severance Policy provided that it would apply only when a company's "management elects to apply [it] to a particular employee-reduction situation." It also conferred authority on management to designate categories of employees who would not be eligible to participate in situations where the Policy was otherwise implemented. The 1981 Severance Policy further provided that:

> 3. Even though the Policy may be in effect for a particular employee-reduction situation, an employee will not qualify for a severance allowance under the following circumstances:
>
> . . . .

g. Sale of facilities when the new owner offers to the employee comparable employment as determined by the Company.

(Pet. App. at A5)

During the spring of 1982, when divestiture of the F & P Division was initially being considered, Amoco's management also began considering the possible implementation of the 1981 Severance Policy in connection with such a divestiture. The cost of doing so was estimated under several alternatives, including the potential exclusion of employees at the retail outlets (pursuant to management authority to designate categories of eligible employees under the Policy).

On August 2, 1982, after Standard's approval of the final Amoco proposal with respect to the Division (which included selling and shutting down the Division in segments, if sale as an entity was not possible), Amoco sought permission from Standard to create a different severance policy to apply to the F & P divestiture:

> The Severance Allowance Policy currently in effect states that severance will not be payable if "the new owner offers to the employees comparable employment as determined by the company." Because of the nature of the fertilizer and pesticides business, it is unlikely that potential buyers would provide wages or the level of benefits comparable to those presently offered by Amoco Oil. Under these conditions, all present Fertilizer & Pesticides employees would probably qualify for severance benefits, regardless of employment opportunities with the new owners. Such payments would amount to approximately $6,200,000. In addition, it is conceivable that many different new owners will be involved, making it difficult to determine comparable employment and inviting possible litigation in the determination of comparable employment.

Acomo Oil recommends that a special Severance Allowance Policy be adopted for the Fertilizer & Pesticides divestiture as follows:

1. Any present Amoco employee who is offered a position with a new owner will forfeit severance consideration, regardless of salary, benefits, or position.
2. Severance payments will be given to current employees who are not offered employment with the new owner, and to employees when facilities are not sold and operations are discontinued.
3. Consent Retirement will be available to current employees with 20 or more years of Retirement Plan participation even if they do not qualify for a severance allowance.

(Pet. App. at A6-A7)

After Standard agreed with this recommendation to adopt a special severance policy for the F & P divestiture, the Severance Allowance Policy of the Fertilizer & Pesticides Division of Amoco Oil Company ("F & P Severance Policy") was created, effective August 1, 1982. It provided, *inter alia*, that:

B. Qualifications—Severance Allowance
   1. An employee will qualify for a severance allowance provided all of the following conditions are met:
      a. The employee becomes unemployed because:
         (1) The Company does not sell the facility and the operations are discontinued, or
         (2) The facility is sold by the Company but the buyer does not offer employment to the individuals.

. . . .

2. An employee will not qualify for a severance allowance under the following circumstances:
   a. Offered a job by the new owner of the facility.

(Pet. App. at A7)

Amoco then promptly informed the F & P employees, both orally and in writing, of the anticipated divestiture and of the conditions under which severance would be paid. Amoco said in a letter dated August 3, 1982, addressed to all employees of the Division, that:

> Amoco Oil Company will announce publicly tomorrow that it plans to offer for sale its entire fertilizer and pesticides marketing and supply system . . . .
> . . . Barring sale of the system as a whole, Amoco plans to sell the system in regional segments . . . .
> If the system is sold as a whole or in regional segments, current employees may be offered employment by the purchaser. Should such sales not occur or employees are not offered employment by the new owners, Amoco will provide severance and if eligible, retirement benefits to regular full-time employees who must leave the company.

(Pet. App. at A8) Amoco also distributed to its employees a press release, dated August 4, 1982, which stated in part: "Amoco will provide severance and appropriate retirement benefits to regular, full-time employees who are not offered employment by the new owners and must leave the company because of the sale." (*Id.*)

In addition, in August, 1982, the Division employees were provided copies of "Questions and Answers About Fertilizer and Pesticides Sale." This document stated, *inter alia:*

3. Does this mean that the Fertilizer & Pesticides facilities will be shut down?

Answer: Finding a suitable purchaser for a business this large requires a lot of time and effort. Active, profitable fertilizer and pesticides operations will not be shut down at this time. Ultimately, we plan to get out of the business.

. . . .

6. Should a purchaser for the system, or parts of it, be found and the purchaser offered Amoco Oil employees jobs, would Amoco Oil provide the regular full-time employees with severance?

   Answer: If a purchaser is found and elects to hire Amoco Oil's current regular, full-time employees, they would not be eligible for severance pay.

7. If I reject a job offer from the new owner, will I forfeit my severence benefits?

   Answer: Yes. Severance benefits will be available only to regular, full-time employees, who are not offered a job.

(Pet. App. at A7-A8) Amoco also held meetings with the F & P employees in early August, 1982 to discuss the divestiture and the conditions under which severance would be paid. The employees were told at these meetings that severance would not be paid if they were offered employment by any purchaser of the facilities where they worked.

After further efforts to sell the Division as an entity were unsuccessful, Amoco began selling and shutting down the Division in regional segments. In early 1983, Amoco (1) sold the processing plant in Rochelle, Georgia to Chemical Enterprises, Inc. and sold or shut down the retail outlets in Georgia; (2) sold the Brunswick, Missouri processing plant and all retail outlets in Missouri and Kansas to SCF, Inc.; and (3) sold the processing plant at

Mt. Carmel, Illinois and the retail outlets served by that facility to Triple T, Inc.

Amoco thereafter received an offer for the remainder of the F & P Division from The Scoular Company and, on June 15, 1983, entered into a purchase and sale agreement with Scoular and The Cropmate Company (a subsidiary created by Scoular). The sale agreement provided, *inter alia*, that the sale would be closed on August 31, 1983, and that before the closing Cropmate would provide Amoco with a list of those F & P employees to whom Cropmate would offer employment. (Pet. App. at A9-A10)

By letter dated June 20, 1983, Amoco told the remaining F & P employees of the sale agreement with Scoular and Cropmate, that the sale closing would be August 31, 1983, and that "the effective date of employment for those employees who are offered and accept employment" with Cropmate would be September 1, 1983. (Pet. App. at A11) In July, 1983, Amoco held termination benefit meetings with the remaining F & P employees. The employees were again told that severance benefits would not be paid to employees who were offered a job. The employees were also told how severance benefits for eligible employees would be computed according to the benefit schedule set forth in the F & P Severance Policy. (Pet. App. at A12)

Scoular's original intention, as communicated to Amoco, was that it would offer employment to most of the F & P employees, and that it would also offer most existing crop guide managers the opportunity to purchase from and lease back to Cropmate the retail outlets where they were presently employed. After the purchase and

sale agreement was executed, Cropmate reviewed the current crop guide managers to determine which ones Cropmate wanted to be part of the new organization. Those crop guide managers and existing helpers that Cropmate wanted to become crop guide managers for Cropmate were then invited to meetings in July, 1983.

Petitioners made numerous allegations regarding what was said at these meetings about employment with Cropmate and the proposed terms of the retail outlet purchase and leaseback. In view of the undisputed facts regarding petitioners' employment with Cropmate after the sale, the courts below held the factual disputes regarding what was said at these meetings to be immaterial to the legal issues presented. (Pet. App. at A11-A12, A40-A41)

The sale closing between Amoco, Scoular and Cropmate was held on August 31, 1983. All of the petitioners except Moldstad became employees of Cropmate on September 1, 1983, in the same positions, at the same salary, and without any agreement to purchase and lease back a retail outlet as a condition to that employment. (Pet. App. at A12-A13) Moldstad refused to work for Cropmate. (Pet. at 7)[2]

Cropmate terminated no one who did not want to buy a retail outlet as of September 1, 1983. Petitioners claimed,

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[2]Six of the petitioners were still employed by Cropmate when they were deposed in this action. Another testified that he quit his job with Cropmate after two weeks to accept other employment. The other testified that he left employment with Cropmate five months later when Cropmate found a "potential" purchaser for his retail outlet and that he returned to full-time farming as he had already planned to do. After beginning employment with Cropmate, three of the petitioners later decided to purchase and lease back their retail outlets (in November, 1983 and February and April, 1984, respectively). (Pet. App. at A12-A13)

however, and Amoco and Standard accepted as true for purposes of their summary judgment motion, that a crop guide manager who did not purchase and lease back his retail outlet was at risk that Cropmate would later sell it to another buyer who might, in turn, decide not to retain the existing manager.[3]

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REASONS FOR DENYING THE WRIT

The Petition claims that this case "raises many of the same basic questions under ERISA concerning the standard of review for 'welfare benefits' " that are before this Court in *Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, *cert. granted,* 56 U.S.L.W. 3682 (U.S. 1988). (Pet. at 11) That is not so. This case and *Firestone* both involve a denial of severance benefits in a "sale of business" situation where the plan participants were employed by the purchaser of the business. However, the similarity between this case and *Firestone* begins and ends at that point. Regardless how this Court decides the issue presented in *Firestone,* that would not affect the result here.

Firestone presents the issue whether the plan participants are entitled to severance *under the terms of the benefit plan* and the proper standard for judicial review of that issue. In this case, by contrast, petitioners are not eligible for benefits unless they may *override* the terms of the benefit plan—*e.g.*, unless they may challenge

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[3]Of the 265 retail outlets purchased by Cropmate from Amoco, no more than six were resold to third parties other than employees.

The extensive undisputed facts regarding the severance benefit claims petitioners filed with Amoco and the plan administrator's and fiduciary's processing of those claims are accurately summarized in the District Court's opinion and will not be repeated here. (See Pet. App. at A13-A16)

the "job offer" term of the F & P Severance Policy as substantively "unreasonable" or prevail on claims that ERISA did not permit the establishment of the F & P Severance Policy in place of the 1981 Severance Policy to govern this divestiture. The Seventh Circuit's decision on these quite different issues is correct, conforms with the decisions of other circuits, and does not warrant further review.

I. This Case Will Not Be Affected By And Should Not Be Held For The Court's Decision In Firestone v. Bruch.

ERISA creates a cause of action for a plan participant or beneficiary "to recover benefits due to him *under the terms of his plan . . . .*" 29 U.S.C. § 1132(a)(1)(B) (emphasis added). In *Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054, this Court has granted *certiorari* to consider the proper standard for judicial review under that section. Specifically, the issue in *Firestone* is the proper standard for review of the plan fiduciary's denial of benefits based upon an interpretation of ambiguous or uncertain plan provisions. In contrast to other circuits which have applied a deferential "arbitrary and capricious" standard of review, the Third Circuit in *Firestone* held that ordinary principles "governing construction of contracts" should apply. *Bruch v. Firestone Tire and Rubber Co.,* 828 F.2d 134, 138, 145 (3d Cir. 1987). Although the Seventh Circuit here, following its earlier precedent, said that the "arbitrary and capricious" standard governs review of denials of benefit claims under ERISA, a contrary conclusion by this Court in *Firestone* would not alter the result in this case.

Firestone, as well as many other circuit court of appeals decisions involving severance benefit claims, all in-

volved benefit plans which generally provided that severance would be paid when employment with the company was terminated; those plans *did not* specifically address the sale-of-business situation and make clear whether benefits would be paid if a participant continued to be employed by a purchaser of the business. *E.g., Bruch v. Firestone,* 828 F.2d at 146; *Simmons v. Diamond Shamrock Corp.,* 844 F.2d 517, 522-23 (8th Cir. 1988); *Adcock v. Firestone Tire & Rubber Co.,* 822 F.2d 623, 624, 626-27 (6th Cir. 1987); *Blakeman v. Mead Containers,* 779 F.2d 1146, 1148-49 (6th Cir. 1985); *Holland v. Burlington Indus., Inc.,* 772 F.2d 1140, 1144 n.2, 1149 (4th Cir. 1985), *aff'd,* 477 U.S. 901, *cert. denied,* 477 U.S. 903 (1986); *Jung v. FMC Corp.,* 755 F.2d 708, 712-13 (9th Cir. 1985). Thus, the issue in those cases was whether the fiduciary had erroneously *interpreted* the plan in determining that benefits would not be paid to employees who continued their employment with the new owner of the business. In such situations involving uncertain or ambiguous plan provisions, the difference between an "arbitrary and capricious" standard and a standard less deferential to the plan fiduciary's interpretation of the plan may well lead to a different result.

However, no such issue is fairly presented in this case. The F & P Severance Policy here *explicitly* addresses the "sale-of-business" situation and *explicitly* provides that an employee who is "offered a job by the new owner of the facility" is ineligible for benefits. (Pet. App. at A7) There is no ambiguity or uncertainty in that language and its plain meaning cannot be avoided regardless of the standard of review applicable to claims to recover, in the words of the statute, "benefits due . . . *under the terms of* [the] plan . . . ." 29 U.S.C. § 1132(a)(1)(B)

(emphasis added). Indeed, the District Court expressly stated that "no issue of plan 'interpretation' is presented here; the F & P Severance Policy expressly provides that employees are not eligible for severance if they are '[o]ffered a job by the new owner of the facility.'" (Pet. App. at A22) While it does not repeat that statement verbatim, the Seventh Circuit's opinion also shows that no issue of plan interpretation is presented here. (*See id.* at A40-A42)[4]

Rather, although the Petition frequently confuses or obscures the issues in an effort to relate this case to *Firestone*, the question in this case is whether petitioners may *avoid* or *override* the terms of the benefit plan. As they repeatedly argued in the courts below, and as is demonstrated by those courts' opinions, petitioners could recover benefits only by prevailing on claims that:

> (a) ERISA or a "federal common law of contracts" prevents an employer from amending a benefit plan with respect to unaccrued and contingent future benefits;

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[4]Petitioners claim there is a "disputed" issue of fact "whether any employment offers were made by Cropmate." (Pet. at 23) That contention is incredible given the undisputed facts that eight of them were *employed* by Cropmate immediately following the sale (in the same jobs, at the same salary, and without any agreement to purchase and lease back their retail facilities) and the ninth admits he refused to work for Cropmate. So far as petitioners mean by that contention that they were not offered "secure" or "permanent" employment with Cropmate, this is not a disputed "fact" issue but rather, as the Seventh Circuit held, an attack on the substantive reasonableness of the terms of the severance policy. *See* Part III, *infra*. And even if there were some disputed issue of fact, *Firestone v. Bruch* does not, as the Third Circuit noted, involve the issue of the proper standard of review under ERISA of "a determination of fact by a plan administrator." 828 F.2d at 144 n.9.

(b) ERISA permits judicial review of the terms of welfare benefit plans for substantive "unreasonableness" or "arbitrariness"; or

(c) plan participants may recover benefits contrary to the terms of the plan based on "procedural" ERISA violations which caused no prejudice to any benefit right or any other substantive harm.

None of these issues was decided or is presented in *Firestone v. Bruch*. The Seventh Circuit decided each of them correctly and in conformity with other circuit court of appeals decisions, and none warrants further review by this Court.

II. ERISA Does Not Prevent An Employer From Amending A Benefit Plan With Respect To Unaccrued And Contingent Future Benefits.

Although it is now confusingly intertwined with other issues in the Petition, the core of petitioners' claim in the District Court was simply this: (1) their jobs with Cropmate were not secure unless they agreed to purchase and lease back their retail outlets; (2) they therefore (allegedly) would have qualified for benefits under the 1981 Severance Policy's provision that severance would be paid to employees who were not offered "comparable employment"; and (3) respondents acted illegally in establishing the F & P Severance Policy to delete the condition that the offered employment be "comparable."[5]

It is undisputed that the F & P Severance Policy was established in August, 1982, long before the sale of the portion of the Division to Scoular and Cropmate and more than a year before petitioners' employment with Amoco

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[5]No such "plan amendment" issue was presented or decided in *Bruch v. Firestone*, as the Third Circuit specifically noted. *See* 828 F.2d at 144 n.11.

was terminated. When that new Policy was established, petitioners were not entitled to benefits under the plain terms of the 1981 Severance Policy, and it was unknown whether they would in the future qualify for benefits under the terms of either the 1981 Policy or the F & P Policy. In particular, no one knew whether the F & P Division would be sold as an entity, sold in segments, shut down or some combination of the latter two possibilities.[6]

It is equally clear that ERISA permitted respondents to establish the F & P Policy with its altered criterion for any future severance benefits. There is no basis in the statute or other law for holding the new Policy retroactively invalid based on events which occurred thereafter and particular facts pertaining to these particular employees' jobs with Cropmate.

As the courts below noted, ERISA divides employee benefits into two categories: (1) "retirement" benefits; and (2) "welfare" benefits, such as medical and disability, and including severance benefits of the type at issue here. 29 U.S.C. § 1002(1)-(2); 29 C.F.R. § 2510.3-2. For most retirement benefits, ERISA imposes minimum requirements for the accrual, vesting and non-forfeitability of benefits under pension plans, as well as for the funding of such plans. 29 U.S.C. §§ 1051-1061, 1081-1086. However, Congress expressly *exempted* welfare benefits from these accrual, vesting and funding requirements. 29 U.S.C. §§ 1051, 1081(a)(1). Thus, welfare benefits (as well as so-called "ancillary" retirement benefits such as early retirement) may be made entirely "contingent" and need not be accrued, vested and made non-forfeitable. Accordingly, an employee's inchoate "interest" in such contingent

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[6]Accordingly, petitioners' assertion that the benefit plan "changes" here were "retroactive" (Pet. at 28) is simply wrong on the undisputed facts of this case.

benefits may be lost if his employment is terminated or the benefit plan is amended or terminated before he becomes eligible under the plan's terms for the payment of such benefits. *E.g., Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574 (3d Cir. 1985). Petitioners' various contentions that Amoco and Standard acted illegally in creating the F & P Severance Policy to govern the divestiture simply attempt to extend to welfare benefit plans the sorts of accrual, vesting and non-forfeitability requirements which Congress determined to require only of retirement plans.

Petitioners' primary contention is that Amoco and Standard breached a "fiduciary duty" in changing the eligibility condition for future benefits. However, an employer does *not* act in a fiduciary capacity or owe a fiduciary duty in creating, amending or terminating a benefit plan. As the Fourth Circuit held in rejecting claims that the employer had breached a fiduciary duty by amending plans to reduce severance and early retirement benefits for employees who continued to work for the purchaser in a sale-of-business context, "[t]he accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits." *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d at 410. Accordingly, although the employer in that case, as in this one, was the plan fiduciary:

> National, in its capacity as a fiduciary, did not violate ERISA. Congress authorized an employer to administer its pension plan, and in the discharge of its duties with respect to the plan, the employer must satisfy the exacting fiduciary standards imposed by

> ERISA. *Congress, however, has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age.* The changes, accomplished in this manner, are not to be reviewed by fiduciary standards.

Id. at 410-11 (emphasis added).

Other decisions by the circuit courts of appeals, including the Seventh Circuit in this case (Pet. App. at A36-A37), have uniformly followed the decision in *Sutton*. *E.g., Anderson v. John Morrell & Co.*, 830 F.2d 872, 875-76 (8th Cir. 1987); *West v. Greyhound Corp.*, 813 F.2d 951, 954-55 (9th Cir. 1987); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1893 (1987); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *United Ind. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268-69 (7th Cir. 1985). *See also Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 3-4 (6th Cir. 1988); *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988). As the Eleventh Circuit reiterated in *Phillips v. Amoco Oil:*

> ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued. Moreover, . . . ERISA . . . envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets.

799 F.2d at 1471.

If the contrary were true, an employer could *never* amend or terminate a benefit plan to reduce or eliminate contingent future benefits. Indeed, every business decision arguably affecting future benefits would have to be

made solely in the interest of plan participants and beneficiaries. *See Dhayer v. Weirton Steel Div. of Nat. Steel Corp.*, 571 F. Supp. 316, 328-29 (N.D. W. Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). There is no basis in the statute for courts to pick and choose among plan amendments and terminations under a "fiduciary" theory, upholding some and disallowing others. Where fiduciary duties are owed under ERISA, *all* actions must be taken "*solely* in the interest of the participants and beneficiaries . . . ." 29 U.S.C. § 1104(1) (emphasis added). If lines are to be drawn in this area and particular types of amendments and terminations for future benefits to be disallowed, that is a task for Congress.

The Petition seeks to confuse the legal issues, arguing in favor of the Third Circuit's decision in *Firestone* and for a "good faith" rather than an "arbitrary and capricious" standard. (*See, e.g.*, Pet. at 15-17) As stated above, however, whether an "arbitrary and capricious," "good faith" or any other standard is the proper one, that issue involves only judicial review of a denial of benefits *under the terms of* a plan. It is simply inapplicable to the issue whether an employer may *amend* a plan with respect to future benefits.

For example, petitioners assert that one factor to be considered under the supposed "good faith" test is "[w]hat has been the past practices of the employer in interpreting and implementing the benefit plan." (Pet. at 16) While prior practices and interpretations of a given plan are relevant to judicial review of a denial of benefits under that *same* plan (under either an "arbitrary and capricious" or a more stringent standard for review, *compare Bruch v. Firestone*, 828 F.2d at 147 *with, e.g., Sim-*

mons v. Diamond Shamrock, 844 F.2d at 523; *Adcock v. Firestone Tire*, 822 F.2d at 626), it is patently irrelevant to the issues of the legality of *amending* the plan or an entitlement to benefits under the plan *as amended*. The very point of a plan amendment is to *change* the terms under which benefits will be provided in the future.[7]

Petitioners also assert that Amoco and Standard were barred by a "federal common law" of contracts and/or estoppel from establishing the F & P Severance Policy in place of the 1981 Severance Policy. (*See* Pet. at 19-20) As shown by petitioners' leading (but consistently miscited) authority for that proposition, *Adcock v. Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985), *rev'd in relevant part and aff'd in part*, 822 F.2d 623 (6th Cir. 1987), that contention, like the discredited "fiduciary" theory, seeks to impose on welfare benefits the vesting and accural requirements which Congress decided to require only for core retirement benefits. *See* 616 F. Supp.

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[7]Petitioners assert that "[n]umerous circuits have expanded the good faith/bad faith issue not only in the area of administration of plans but amendments and terminations thereof," but *none* of the cases cited to support that proposition in fact does so. (See Pet. at 16 and cases cited) Some cases cited at other points in the Petition did involve plan amendments but are inapposite here because they involved both pension plans and amendments *promulgated by plan fiduciaries acting in their capacities as such*. E.g., *Argo v. Joint Plumbing Industry Bd.*, 623 F.2d 207 (2d Cir. 1980); *Northeast Dept. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985); *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), *cert. denied*, 108 Sup. Ct. 698 (1988). Without noticing that crucial distinction, the court in *Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986), did apply the analysis in *Argo* to a plan amendment by the employer. However, the result reached in *Baker* is fully consistent with the result in this and the other cases following *Sutton*. *See* 793 F.2d at 513-14.

at 413-19, 423-24.[8] Judicial creation of a "federal common law of contracts" to bar terminations and amendments of welfare benefit plans eliminating or reducing future benefits would contravene both the statutory scheme and the settled rule that "[a]n employer may change such benefits . . . ." *Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). *See Anderson v. John Morrell & Co.*, 830 F.2d 872, 876-77 (8th Cir. 1987); *United Elec., Radio and Mach. Workers v. Amcast Indus. Corp.*, 634 F. Supp. 1135, 1142-43 (S.D. Ohio 1986) (rejecting both "fiduciary" and "federal common law of contracts" theories as inconsistent with the statute); *cf. Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 3-4 (6th Cir. 1988) (holding a similar contention inconsistent with the statute and implicity an attempt to assert a state law claim that is preempted by ERISA).

Moreover, petitioners would not be entitled to benefits here even if plan amendments or terminations with respect to unaccrued future benefits *were* controlled by a "federal common law of contracts." The 1981 Severance Policy (like each of the preceding severance policies) provided that:

> The Company reserves the right to amend, modify, suspend, or discontinue the Policy and any such action shall apply to existing as well as future employees.

(Pet. App. at A20) Where this power to amend or abolish is reserved in the plan, there is no basis in "contract law" or "estoppel" for holding that the employer may not exercise it. *Cattin v. General Motors Corp.*, 641 F. Supp.

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[8]On appeal in *Adcock*, the Sixth Circuit reversed this portion of the district court decision on other grounds, stating that if it were to reach the issue on the merits, the "district court's contract analysis" would "likely . . . be reversed . . . ." 822 F.2d at 627 & n.13 (citation omitted).

591, 595-96 (E.D. Mich. 1986); *see also Anderson v. John Morrell & Co.*, 830 F.2d 872, 876-77 (8th Cir. 1987); *In re White Farm Equip. Co.*, 788 F.2d 1186, 1190-93 (6th Cir. 1986).[9]

III. Under ERISA, Plan Participants May Not Challenge Welfare Plan Provisions As Substantively "Unreasonable" or "Arbitrary".

In the courts below, petitioners argued that they should receive severance benefits because their jobs with Cropmate were "temporary" and not sufficiently secure—*i.e.*, if they did not later purchase their retail outlet and lease it back to Cropmate, there was a risk that Cropmate might find another buyer who would in turn decide not to retain the existing crop guide manager. The Petition apparently advances the same contention in the guise of claiming that petitioners were really not "offered jobs" by Cropmate. (The contention is otherwise unintelligible given the undisputed fact that they were *employed* by Cropmate.) Petitioners also advance a similar contention in claiming that judicial review of the denial of severance should consider whether "the sale contract between the seller and purchaser binds the purchaser to offer continued benefits including severance." (Pet. at 17)

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[9]Even apart from this reserved power to amend or abolish the 1981 Severance Policy, petitioners' "contract" contention ignores that there was no unilateral entitlement to severance benefits under that Policy in any event. Rather, benefits under the 1981 Policy depended upon a management decision to implement the policy "for a particular employment reduction situation," and further gave management discretion to designate the eligible categories of employees if the Policy were implemented. (Pet. App. at A5) While the F & P Policy changed the eligibility criterion in the sale-of-facility situation to delete the requirement that the job offered be "comparable," it at the same time guaranteed severance to all employees who were not offered jobs whereas there was no such guarantee under the 1981 Policy.

However, under the express terms of the F & P Severance Policy here, the applicable trigger for benefits is *only* whether the individual employee was "offered a job" by a purchaser of his facility. The Policy's criteria do *not* include an analysis of the relative "security" of a given job, nor the length of time the employee keeps a new job, nor for what reasons an employee might subsequently choose to leave, or be forced to leave, the new job. It contains no requirement that Amoco re-determine a former employee's right to severance benefits if his employment with the purchaser did not endure, or do so if the cause of a subsequent employment termination was not the result of the employee's fault or choice.[10]

In these circumstances, petitioners' "job security" contentions simply amount to a substantive attack on the terms of the severance policy itself, implicitly claiming that it ought to be more "finely tuned" to take such factors into account. However, ERISA does *not* require severance plans to include such additional factors and considerations. The statute simply does "not regulate the

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[10]True, given the "unemployment compensation" purpose of severance pay, windfall gains and losses can occur in individual cases. A particular employee not offered a job by the purchaser of his facility might have alternative employment already arranged by the time of his termination with Amoco, or secure alternative employment promptly thereafter, thus receiving severance pay but not really "needing" it in light of its purpose. By contrast, another employee, although offered a job by the purchaser, might lose the job for any number of reasons and thus have a "need" for severance pay within a short time after the sale. Such possibilities in particular cases notwithstanding, however, Amoco chose and implemented an administratively simple policy that did not require it to police the employees' subsequent employment relationships with other employers or to re-determine severance eligibility based upon future events. Under the F & P Severance Policy, severance benefits are payable or not depending upon a single fact at the time of sale and termination of the employment relationship with Amoco—whether the employee was offered a job by the purchaser.

substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 732 (1985).

The general "arbitrary and capricious" standard of review employed by most circuits has frequently led plan participants to challenge as "arbitrary" plan provisions which result in ineligibility for benefits in particular circumstances. Such contentions misapprehend the role of the courts and judicial review under ERISA. ERISA provides only for judicial review of the denial of a benefit claim (whether under an "arbitrary and capricious" or any other standard of review) *given* the terms of the benefit plan. 29 U.S.C. § 1132(a)(1)(B). Except in areas where the statute imposes substantive requirements for plans—and it contains no such requirements for welfare benefit plans—participants may not challenge *the terms of the plan itself* as "arbitrary" or "unreasonable." Courts are not authorized to redraft plan eligibility requirements to provide benefits for particular employees based on claims of "unfairness," to "better accomplish the purpose" of the benefit plan, or to avoid "harsh results" caused by the application of an eligibility rule to individual circumstances.

There is no disagreement among the circuits on these principles. For example, in *Moore v. Reynolds Metals Co. Ret. Program,* 740 F.2d 454 (6th Cir. 1984), *cert. denied,* 469 U.S. 1109 (1985), a plan provision requiring a five-month waiting period for disability retirement resulted in a loss of all retirement benefits by a dependent spouse of an employee who became disabled but died before the end of the waiting period. The court held that the spouse could not attack the plan provision as illegally "arbitrary and capricious":

> [O]nce a plan is established and is governed by the requirements of ERISA, courts may review a decision by trustees to deny benefits . . . . Such review, however, is limited to a determination of whether the trustees' actions in *administering* or *interpreting* a plan's provisions are arbitrary and capricious . . . . Courts . . . have not been authorized by Congress to impose upon employers the court's subjective beliefs concerning the relative value of benefits which employers have chosen voluntarily to confer upon employees.

740 F.2d at 457 (emphasis added; citations omitted). *Accord, e.g., Norman v. United Mine Workers of America Health and Ret. Funds,* 755 F.2d 509, 510 (6th Cir. 1985); *Sharron v. Amalgamated Ins. Agency Services, Inc.,* 704 F.2d 562, 569 (11th Cir. 1983); *Torimino v. United Food and Com. Workers Int'l Union Indus. Pension Fund,* 548 F. Supp. 1012, 1014-15 (E.D. Mo. 1982), *aff'd,* 712 F.2d 882 (8th Cir. 1983); *cf. United Mine Workers of America Health & Ret. Funds v. Robinson,* 455 U.S. 562, 573-76 (1982) (court has no authority under 29 U.S.C. § 186 to review for substantive reasonableness terms of pension plan created pursuant to collective bargaining agreement).

Accordingly, the courts below correctly rejected petitioners' contentions which implicitly challenge the substantive content of the severance policy here. (Pet. App. at A20-A21, A42) Claims by petitioners that their employment with Cropmate was "insecure" are legally immaterial under ERISA. Because they were in fact employed by Cropmate, they are not eligible for severance under the express terms of the Policy, notwithstanding any claim that the plan's term is "unreasonable" or "arbitrary" in application to their individual situations.

Petitioners' argument that they should receive severance from Amoco because Cropmate did not have a sever-

ance plan of its own suffers the same legal deficiencies. Under the F & P Severance Policy, the criterion for severance is—and is only—whether the employee is offered a job by a purchaser of the facility. There is no term providing that severance will be paid if the purchaser has no severance plan and the employee loses his job in the future. Under ERISA, that is the end of the matter. There is *no* requirement that a benefit plan contain such additional criteria.

IV. Plan Participants Are Not Entitled To Benefits Contrary To The Terms Of The Plan Based On Procedural ERISA Violations Which Caused No Prejudice To Any Benefit Right Or Any Other Substantive Harm.

Petitioners' final argument, albeit confusingly interspersed with their other contentions, is that they should receive severance benefits because respondents violated disclosure and other "procedural" ERISA requirements. This argument is based upon numerous "factual" assertions contrary to the undisputed evidence of record and is refuted by uniform case law from all circuits which have considered the issue.

The Petition asserts that "Respondents totally ignored the ERISA mandates of disclosure and all other applicable procedures, especially the provision of a meaningful claims procedure as mandated in 29 U.S.C. § 1133." (Pet. at 17) This contention regarding the "claims procedure" and "29 U.S.C. § 1133" is squarely contradicted by the terms of the F & P Severance Policy which, although not quoted in the District Court's opinion, established the required procedure. It is also refuted by the uncontradicted evidence, detailed in the District Court's opinion, demonstrating that petitioners' claims for sever-

ance benefits were processed properly and in the ordinary course. (*See* Pet. App. at A14-A16)

Petitioners also urge that they were not given a summary plan description for severance benefits as required by 29 U.S.C. §§ 1022, 1024. However, the undisputed evidence establishes that in early August, 1982, within days after the divestiture plan was approved and the F & P Severance Policy was created, petitioners were repeatedly told, both orally and in writing, of the material facts—*i.e.*, that Amoco would try to sell the F & P Division and in any event planned eventually to leave the business, that severance benefits would be paid to employees who were not offered employment by any purchaser of their facility, and that severance would not be paid to employees who were offered a job. *See* pp. 5-7, *supra*.

Amoco and Standard disagree with the Seventh Circuit's statement that:

> [T]he employees were not made aware that they were now ineligible for benefits if they received *any* offer of employment from a potential purchaser rather than an offer of *comparable* employment, as previously set forth in the 1981 severance policy. Nor did a later press release or a "Question and Answer" brochure make this clear.

(Pet. App. at A29; emphasis in original). The written documents specifically stated the material terms of the F & P Severance Policy using the identical words: That severance (1) would be paid to employees who were "not offered employment" by a purchaser and (2) would not be paid to employees who were "offered a job." *See* pp. 5-7, *supra*. And as one of the petitioners testified, the employees were also orally told that:

> [I]f you were offered a job with the new company you wouldn't receive severance, if you're not offered

a job, you would receive. You wouldn't receive if you were offered a job, you would receive if you weren't.

In any event, petitioners submitted no evidence that, after these oral and written disclosures in August, 1982, any of them "misunderstood" the "job offer" rule and believed that he would receive severance if he was not offered a "comparable" job. Nor is there evidence that petitioners' benefit rights were in any way prejudiced by such a misunderstanding, or even that they continued their employment with Amoco rather than leaving the company based upon such a misunderstanding. Nor is there evidence of any substantive harm or prejudice to petitioners' benefit rights based upon a failure to describe the severance policy in a document entitled "summary plan description." (*See* Pet. App. at A21) In such circumstances, the circuit courts of appeals have repeatedly and consistently held that "procedural" defects in creating or disclosing a severance benefit plan do *not* create a substantive entitlement to benefits. *E.g., Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 524-25 (8th Cir. 1988); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 627 n.10 (6th Cir. 1987); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149-50 (4th Cir. 1985), *aff'd*, 477 U.S. 901, *cert. denied*, 477 U.S. 903 (1986); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1521 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Pabst Brewing Co. v. Anger*, 610 F. Supp. 214, 216 (D. Minn. 1985), *aff'd on basis of district court opinion*, 784 F.2d 338 (8th Cir. 1986).[11]

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[11]Because the cases cited above involved severance plans which did not expressly address the "sale-of-business/subsequent employment with the purchaser" situation, one issue presented was whether the plan had been erroneously *interpreted* (*i.e.*,

(Continued on following page)

Petitioners argue the contrary based on *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985), but that case is inapposite and there is no circuit split on this issue. First, in *Blau*, the employer had "flouted in . . . a wholesale and flagrant manner" "virtually every applicable mandate of ERISA." *Id.* at 1353. Among other things, the employees were never told of the severance policy or its terms and it was "actively concealed" from them, they were never informed of the decision to deny benefits, they were never told of a procedure for filing a claim for benefits, and the plan in fact had no such procedures. *Id.* at 1351-53. Not one of those factors is presented in this case, let alone all of them.

Subsequent circuit decisions (including one by the Ninth Circuit which decided *Blau*) have confined the holding in *Blau* to such "wholesale and flagrant" violations of ERISA. In *Holland v. Burlington Indus.*, for example, employees who were given a "general statement of [the severance] policy" and "promptly informed . . . that severance pay was not available" when the business was sold, were not entitled to severance benefits on the basis of "procedural violations." 772 F.2d at 1149-50. *Accord*,

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(Continued from previous page)

whether the participants were entitled to benefits *under the terms* of the plan). In that context, certain of those cases considered whether "procedural" ERISA violations justified departure from the "arbitrary and capricious" standard of review. *See Holland*, 772 F.2d at 1149; *Anderson*, 759 F.2d at 1521. The latter issue is similar to the one before this Court in *Firestone v. Bruch*, No. 87-1054. For the reason stated in Part I, *supra*, no such issue is fairly presented in this case. Here, the F & P Severance Policy expressly addresses the "sale-of-business" situation and expressly provides that employees who are offered a job by a purchaser are ineligible for severance. Hence, petitioners here are not entitled to benefits unless a procedural ERISA violation which causes no prejudice or injury permits plan participants to *override* the terms of their benefit plan.

e.g., Simmons v. Diamond Shamrock, 844 F.2d at 524-25; *Anderson v. Ciba-Geigy,* 759 F.2d at 1521-23; *Jung v. FMC Corp.,* 755 F.2d 708, 714-15 (9th Cir. 1985).

Second, in *Blau,* the severance policy did *not* address the "sale of business" situation and bar benefits to employees who went to work for a purchaser. Hence the issue was whether the plan administrator had erroneously interpreted the policy to "impose[] . . . standards not required [by its terms]. 748 F.2d at 1354-55. In this case, by contrast, the "job offer" eligibility condition appears on the face of the F & P Severance Policy.

Nothing in *Blau* (or any other case) suggests that procedural ERISA violations which cause no substantive harm permit plan participants to override the express terms of the benefit plan. To the contrary, the *Blau* court noted that under ERISA, a court on review "has no authority to [re]draft the substantive content of [welfare benefit] plans." *Id.* at 1353. *See also, id.* at 1354 n.2. And as that same court held in a later case, under ERISA:

> Procedural defects do not necessarily require substantive remedies. A substantive remedy would be appropriate only if the procedural defects caused a substantive violation or themselves worked a substantive harm.

Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985) (citations omitted).

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CONCLUSION

The decision below is correct and conforms with the uniform view among the circuits on each of the issues fairly presented by this case. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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